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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-777

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPE-FITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,

Respondent.

CORRECTED COPY

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND BRIEF OF AMICI CURIAE PUBLIC SERVICE ELECTRIC AND GAS COMPANY, AMERICAN CYANAMID COMPANY AND EDISON ELECTRIC INSTITUTE

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ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPE-FITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,

Respondent.

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF ON BEHALF OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY, AMERICAN CYANAMID COMPANY AND EDISON ELECTRIC INSTITUTE

To The Honorable Chief Justice and Justices of The Supreme Court of the United States:

The motion of Public Service Electric and Gas Company, American Cyanamid Company and the Edison Electric Institute respectfully shows to the Court:

1. Public Service Electric and Gas Company (hereinafter Public Service) is a New Jersey corporation and the eighth largest public utility in the United States. American Cyanamid Company (hereinafter American Cyanamid) is a New York based corporation engaged in the manufacture of chemicals and allied products with plants throughout the United States. The Edison Electric Institute is the principal national association of investor-owned electric light and power companies in the United States. Public Service and American Cyanamid have participated in this case as amici before the United States Court of Appeals for the District of Columbia Circuit. In that court, those movants filed an extensive brief in support of the position of the National Labor Relations Board (hereinafter the Board). In addition, Public Service and American Cyanamid were permitted by the Court to file a brief in this matter in support of the Board's Petition for Certiorari.

Movants Public Service and American Cyanamid have also participated as amici before the Board in its consideration of similar issues in *Local 438 Plumbers & Pipefitters (George Koch Sons, Inc.)*, 201 NLRB 59 (1973), and *Local 742 Carpenters (J.L. Simmons Company)*, 178 NLRB 351 (1969), enforcement denied and remanded, 444 F.2d 895 (D.C. Cir. 1971); supp. dec. —— F.2d ——, 91 LRRM 2595 (D.C. Cir. 1976). In addition, they filed an amici brief and participated in oral argument in the Fourth Circuit's consideration of *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323 (4th Cir. 1973). Respondent has declined its consent to the filing of this biref. Accordingly, movants proceed under Rule 42(2).

2. The question before the Court is of vital concern to movants and to the individuals and industries they service. The facilities of Public Service constitute a vital link in the interconnected power system known as the Pennsylvania-New Jersey-Maryland connection (PJM). In order

to sustain its position in that system, Public Service, which provides service to approximately six million people, is continuously engaged in a program of construction and maintenance. Its construction program is an ongoing endeavor which will involve the expenditure of billions of dollars. For example, it is presently engaged in the construction of two multi-million dollar nuclear generating stations within the State of New Jersey and is in an advanced planning stage for a third facility utilizing nuclear power. The member companies of the Edison Electric Institute provide service to 99% of all customers served by investor-owned electric utilities and 77.5% of the nation's electricity users. Investor-owned electric light and power companies have budgeted $18 billion for construction in 1976. Last year (1975) such companies spent $15.1 billion for construction. Thus, together, they probably constitute the greatest single private purchaser of construction in the nation. Similarly American Cyanamid is continually engaged in construction projects at its plants throughout the United States and expends large sums in such projects.

3. The essential issue raised by this case is whether a union violates the secondary boycott provisions of the National Labor Relations Act when it induces its members to refuse to handle prefabricated goods that their employer's union contract obligates the employer to install or utilize. As Public Service, American Cyanamid and the member companies of the Edison Electric Institute rely upon union labor, the resolution of that issue will have a significant impact upon the labor costs which they incur and upon their decision to utilize such materials in the future.

4. Because Public Service and the members of the Edison Electric Institute are public utilities, their rates are subject to the closest possible public scrutiny and are inextricably intertwined with the public interest. Their obligation to avoid escalating construction costs, which

must ultimately be borne by the consumer, and to provide the best possible service at the lowest possible cost, is a public trust which they must fulfill. Similarly, American Cyanamid, in its obligation to its stockholders, employees and customers, is also concerned with both the cost of construction and the avoidance of labor disputes which inhibit and delay such projects.

5. Clearly, the Board's approach to this issue recognizes the construction industry's critical need for technological development which is dependent in such large measure upon prefabrication. Rejection of that approach would severely impede Public Service, the member companies of the Edison Electric Institute and American Cyanamid, as well as companies similarly situated, in their continuing struggle to keep pace with the needs of our society. Moreover, rejection of the Board's position will have an adverse radiating effect upon companies and their employees engaged in the manufacture of prefabricated materials. Accordingly, the participation of Public Service, American Cyanamid and the Edison Electric Institute will provide an extra dimension to the arguments presented by the Board and Respondent as they will present to the Court the views of the purchasers of construction whose interest will be vitally affected by the Court's decision.

WHEREFORE, Public Service Electric and Gas Company, American Cyanamid Company and Edison Electric Institute respectfully move this Court for leave to file their joint brief as amici curiae in support of the position of the National Labor Relations Board.

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Respondent.

BRIEF ON BEHALF OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY, AMERICAN CYANAMID COMPANY AND EDISON ELECTRIC INSTITUTE AS AMICI CURIAE

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Introduction

This brief on behalf of Public Service Electric and Gas Company, American Cyanamid Company and the Edison Electric Institute, as amici curiae, is filed pursuant to leave of Court granted upon motion made in accordance with Supreme Court Rule 42(2). It is in support of the Petitioner, the National Labor Relations Board.

Interest of Amici

Public Service Electric and Gas Company (hereinafter Public Service), the eighth largest public utility in the United States serving approximately six million consumers, together with American Cyanamid Company, (hereinafter American Cyanamid) a principal manufacturer of chemicals and allied products with plants throughout the United States, have participated in this proceeding as amici curiae before the United States Court of Appeals for the District of Columbia Circuit and have filed a brief in support of the Board's Petition For Certiorari. They have also participated as amici curiae in *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323 (4th Cir. 1973), a case in which the Fourth Circuit, contrary to the District of Columbia Circuit, approved the Board's "right-to-control" test in similar factual circumstances. The Edison Electric Institute (hereinafter the Institute) is the principal national association of investor-owned electric light and power companies in the United States and joins now with Public Service and American Cyanamid in this brief in support of the position of the National Labor Relations Board.

The question presented by this case is of vital concern to each of the moving companies, to the members of

the Institute and to the persons and industries they serve. Indeed, its impact is such that it may properly be regarded as one of the most significant issues which the Court has been petitioned to decide in the field of construction labor law in recent years.

The facilities of Public Service constitute a vital link in the interconnected power system known as the Pennsylvania-New Jersey-Maryland connection (PJM). In order to sustain its position in that system, Public Service has embarked upon a major and continuing program of construction and maintenance. Ultimately, this program will involve an expenditure of billions of dollars. For example, it is presently engaged in the construction of two multi-million dollar nuclear generating stations within the State of New Jersey and is in an advanced planning stage for a third such facility. Member companies of the Institute last year expended $15.1 billion for construction and have budgeted $18 billion in construction for 1976. Similarly, American Cyanamid is continually engaged in construction projects at its plants throughout the United States. In the performance of such construction, amici rely upon union labor.

The use of prefabricated materials in the making of repairs and in new construction is obviously of immediate and critical concern to amici as well as to other purchasers of union construction. Moreover, the right of such purchasers to elect to use prefabricated materials free from fear of labor retaliation warrants judicial protection.

Because Public Service and the member companies of the Institute are public utilities, their rates are subject to the closest possible public scrutiny and are inextricably intertwined with the public interest. Their obligation to avoid excessive construction costs, which must ultimately be borne by the consumer, and to provide the best possible

service at the lowest possible cost, is a public trust which they must fulfill. American Cyanamid, in its obligation to its stockholders, employees and customers, is similarly concerned with both the cost of construction and the avoidance of labor disputes which inhibit and delay such projects.

The Board's approach to the issue presented is consistent with established principles of labor law and contributes to an economic atmosphere in which technological progress may be achieved. Rejection of that approach would severely impede Public Service, the Institute and American Cyanamid as well as other purchasers of construction in their continuing struggle to keep pace with the needs of our society. Accordingly, amici strongly support the position of the National Labor Relations Board.

Summary of Argument

This case brings before the Court an issue over which the courts of appeals are in sharp conflict. The five to four decision below advances the view that the Board has applied its so-called "right-to-control" doctrine as a *per se* test of unlawful secondary conduct and that such doctrine misconstrues Section 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. §158(b)(4)(B) as applied by this Court in *National Woodwork Manufacturers Ass'n.* v. *N.L.R.B.*, 386 U.S. 612 (1967). The opposing view, represented by the opinion of the four dissenters below, the decision of the Fourth Circuit in *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323 (4th Cir. 1973) and the decision of the Ninth Circuit in *Associated Contractors of California, Inc.* v. *N.L.R.B.*, 514 F.2d 433 (9th Cir. 1975), accepts the Board's right-to-control doctrine as a *prima facie* test of secondary objectives. Initially, therefore, this Court

must determine whether the Board has applied the right-to-control criteria to the exclusion of other factors or whether it has, as amici assert, adhered to the standard established by this Court in *National Woodwork* and examined "all of the surrounding circumstances".

Uniformly, the courts that have disapproved the Board's approach have based their disapproval upon *National Woodwork,* ignoring or misconceiving the fact that in *National Woodwork* this Court expressly declined to pass upon the issue now presented, namely, whether an employer who does not have the power to accede to a union's demand is a neutral entitled to the protections of the Act.

Prior to *National Woodwork,* the circuits which had considered the issue, including the District of Columbia Circuit, had approved the Board's examination of a contractor's right-to-control as a test of secondary objectives. Amici submit that the teachings of *National Woodwork* do not disturb the sound foundation in legislative history and judicial precedent upon which those decisions were founded.

In *Connell Construction Co.* v. *Plumbers Local 100,* 421 U.S. 616 (1975), this Court recently condemned as a violation of anti-trust law the efforts of a union to organize employees of a subcontractor by exerting economic pressure upon an employer with which it did not enjoy a collective bargaining relationship. The analogy to the Board's right-to-control doctrine is clear. Rejection of this doctrine will permit unlawful pressure to be asserted upon a party which, because it is unable to satisfy the union's demand, is clearly a neutral to the dispute entitled to remain free of coercive conduct.

The present conflict among the circuits leaves this critical area of construction labor law unsettled. Purchasers

of construction, such as amici, are confronted with the dilemma of either foregoing the advantages of technological progress if they desire to build with union labor or incurring the risk of labor difficulties with its concomitant delays and added costs. Amici, therefore, urge the Court to reverse the decision below and to reaffirm the sound principles of *N.L.R.B.* v. *Denver Building Trades Council*, 341 U.S. 675 (1951), and later decisions which have defined primary and secondary conduct and have assured to neutral parties the protection intended by Congress in its enactment of Section 8(b)(4)(B) of the National Labor Relations Act.

ARGUMENT

POINT I

The Board has not applied its right-to-control doctrine as a per se test of secondary activity.

From its initial paragraphs to its conclusion, the majority opinion below is critical of the Board's persistence in applying the right-to-control test despite the prior rejection of that doctrine by the District of Columbia Circuit and four other circuits.[1] Nevertheless, as pointed out by the dissent, the Board has never applied the right-to-control test with the exclusivity attributed by the Dis-

[1] *Local 742 Carpenters* v. *N.L.R.B.*, 444 F.2d 895 (D.C. Cir. 1971), cert. denied, 404 U.S. 986; *Local 636 Plumbers & Pipefitters* v. *N.L.R.B.*, 430 F.2d 906 (D.C. Cir. 1970); *N.L.R.B.* v. *Local 164, I.B.E.W.*, 388 F.2d 105 (3rd Cir. 1968); *American Boiler Mfrs. Assn.* v. *N.L.R.B.*, 404 F.2d 556 (8th Cir. 1968); *Beacon Castle Square Building Corp.* v. *N.L.R.B.*, 406 F.2d 188 (1st Cir. 1969); *Western Monolithics Concrete Products, Inc.* v. *N.L.R.B.*, 446 F.2d 522 (9th Cir. 1971).

trict of Columbia Circuit and the other disapproving circuits. Thus, while conceding that lack of control is an important element to be considered by the Board in determining whether a union is engaged in permissible conduct in an effort to preserve its traditional on-site work or whether it is engaged in illegal secondary activity, the court below dismisses each effort by the Board to demonstrate that its determination is based on a total factual analysis. For example, the Board's effort to reassure the disapproving circuits in *Local 438 Plumbers & Pipefitters*, 201 NLRB 59 (1973), enforced sub nom., *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323 (4th Cir. 1973), that it does indeed consider all the surrounding circumstances and does not apply the right-to-control test to the exclusion of all other factors is rejected out of hand.[2] More recently, the District of Columbia Circuit rejected the thorough factual analysis of the Board in *Local 742 Carpenters* v. *N.L.R.B.*, 444 F.2d 895 (D.C. Cir. 1971), cert. denied, 404 U.S. 986 (1971), supplemental decision, —— F.2d ——, 91 LRRM 2595 (D.C. Cir. 1976), which the District of Columbia Circuit had remanded because of what it considered to be the Board's per se application of the right-to-control test. Similarly, in the instant case, the thorough factual analysis of the Administrative Law Judge, which was adopted by the Board, is ignored in the court's zeal to once again chastise the Board for what it perceives as a reluctance to accept the direction of the circuits which have rejected the right-to-control test.

One must wonder whether the Board could obtain the approbation of such courts by any analysis except one which completely ignored the issue of control. In short, does the court below reject the right-to-control test as a *per se* doctrine or does it condemn the Board for attaching any meaningful significance to the lack of control?

[2] 521 F.2d 885, 889 (D.C. Cir. 1975), n.4.

The Board's disavowal of a "per se" approach was examined and accepted by the Fourth Circuit in its review of *Koch*. There the Court said, ". . . the Board has not exalted right to control as *per se* the conclusive indicium of a secondary boycott. On the contrary, the Board obediently followed the Court's instruction, according weight to all existing and relevant circumstances".[3] Thus, in essence, the Board was applying the same rule of law it had applied prior to the decision of this Court in *National Woodwork Manufacturers Association* v. *N.L.R.B.*[4]

This case, consequently, does not come before the Court as one in which the Board insists upon application of the "right-to-control" test to the exclusion of all other factors.

In addition to Hudik's lack of control, the Board considered *inter alia* the following factors:

1. The disputed work was substantially more than just cutting and threading the pipe to connect the air conditioning units to the basic piping that ran throughout the building. It would have required Hudik's employees to connect two valves and a condenser. Thus, the union sought to perform final assembly work on internal parts of the air conditioning units.[5]

2. The union knew that Austin, as the general contractor, was the only party with the power to comply with its demand.

[3] 490 F.2d at 327.

[4] 386 U.S. 612 (1967) affirming in part and reversing in part 354 F.2d 594 (7th Cir. 1965).

[5] 521 F.2d at 916.

3. Warranties accompanying the air conditioning units required that all internal piping be completed by the manufacturer's employees.

4. Austin had contracted for the purchase of prepiped Slant/Fin units before it subcontracted the heating, ventilation and air conditioning work to Hudik.

5. By declining to bid on projects with prefabricated air conditioning units Hudik could neither preserve work for his employees nor continue to be a competitive subcontractor.

6. New York City was an area in which non-union steamfitters or mechanical contractors were virtually unavailable. Accordingly, by bringing pressure upon Hudik, a union subcontractor, the union could effectively pressure Austin and other engineers not to utilize such units. Indeed, it could ultimately influence the decision of the manufacturer to withdraw from its own employees the right to install such internal piping in units destined for New York City or other highly unionized areas.

7. The record was devoid of any evidence that Hudik contributed in any way to its inability to assign the disputed work to its own employees.

Thus, having examined all of the surrounding circumstances as required by this Court's decision in *National Woodwork*[6] the Board concluded that an object of the union's conduct was to bring pressure upon Austin and Slant/Fin by striking Hudik, a neutral to the dispute,

[6] *National Woodwork Mfgs. Assn.* v. *N.L.R.B.*, 386 U.S. 612 (1967).

which was without power to accede to the union's demands. Therefore, as pointed out by the dissenting members of the court below:

> "The Board does not employ a per se formulation, which might well violate the stricture of *National Woodwork* that the focus of the union's action must be determined from all the surrounding circumstances; instead, the Board relies on a *prima facie* standard. By this test, a union may not boycott an employer who lacks the right to control the assignment of disputed work, *provided* that the employer has not voluntarily relinquished that control." 521 F.2d at 931[7]

Simply stated, the Board has said that where, as in the instant case, the union's actions are motivated by work preservation aims and directed against an employer who, *through no fault of his own,* is incapable of acceding to the union's demands, it must be concluded, absent other controlling factors, that the union's actions were undertaken for their effect elsewhere. Consequently, the pressured employer must be secondary in the dispute. By that approach, the Board has fulfilled the Congressional mandate to preserve the right of labor organizations to bring pressure to bear upon an offending employer in a primary labor dispute and to shield unoffending employers and others from pressure in controversies not their own. *N.L.R.B.* v. *Denver Building and Construction Trades*

[7] See, for example, *Pipefitters Local No. 120, United Association,* 168 NLRB 991, 992 (1967); *Painters District Council No. 20,* 185 NLRB 930, 932 (1970) where the employers' loss of control over the disputed work was the result of their own efforts. Compare *Carpenters Local 112 (Summit Valley Industries),* 217 NLRB No. 129 (decided May 12, 1975; 89 LRRM 1799).

Council, 341 U.S. 675, 692 (1951). To require that the Board attach little, if any, significance to the ability of a contractor to comply with a union's demands as a test of secondary conduct would so obscure the distinction between primary and secondary activity as to virtually repeal Section 8(b)(4)(B) of the Act by judicial fiat.

In *N.L.R.B.* v. *Local 825 Operating Engineers,* 400 U.S. 297 (1971) Justice Marshall stated that there are two threads to Section 8(b)(4)(B) that require disputed conduct to be classified as either "primary" or "secondary". He then commented that "[T]he tapestry that has been woven in classifying such conduct is among the labor law's most intricate." 402 U.S. at 303, 304. It is indeed, and the task of classifying such conduct will become ever more difficult if the Board is required to abandon its application of the right-to-control doctrine.

In contrast to a manufacturing plant, labor relations in the construction industry are infinitely more complex. A manufacturer has the opportunity to deal with each and every union with which he has relations and can and does hire all employees on his direct payroll. His production is only indirectly affected by the labor relations of other companies and he is rarely retricted in his relations with his customers or suppliers.

The contractor, on the other hand, is caught in a maze of contractual relationships at a job site where hot cargo clauses, sub-contractor clauses, work preservation clauses and the like have been developed by astute building trade unions attempting to avoid secondary entanglements and to give their disputes the ostensible appearance of primary action. Thus, a craft union's efforts to radiate its control upward[8] or downward for work to be done at the

[8] *N.L.R.B.* v. *Local 164, IBEW,* 388 F.2d 105 (3rd Cir. 1968).

job site,[9] or laterally for supplies or equipment purchased off the job site but to be used at the job site,[10] are all designed to completely obliterate secondary boycotts. In many instances, these tactics, improper as they are, have erroneously been sanctioned. However, the principles of *Denver Building Trades,*[11] *Moore Drydock*[12] and *General Electric*[13] are still viable, and stand unaltered as this Court is again called upon to effectuate the congressional purpose of protecting neutral parties from disputes not of their own making and over which they have no control.[14]

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[9] *Construction Laborers* v. *N.L.R.B. (Colson & Stevens Construction Co.),* 323 F.2d 422 (9th Cir. 1963), modifying 137 NLRB 1650); *Connell Construction Co.* v. *Plumbers Local 100,* 421 U.S. 616 (1975).

[10] *National Woodwork Manufacturer's Association* v. *N.L.R.B.,* 386 U.S. 612 (1967).

[11] *N.L.R.B.* v. *Denver Building Trades Council,* 341 U.S. 675 (1951).

[12] *Sailors Union of the Pacific,* 92 NLRB 547 (1950).

[13] *Local 761 International Union of Electric, Radio and Machine Workers, etc.* v. *N.L.R.B. (General Electric),* 366 U.S. 667 (1961).

[14] The majority below expresses the view that Hudik-Ross' refusal to bid on the Austin contract would serve work preservation goals by persuading Austin and other engineers and general contractors not to specify their purchase and use in buildings. 521 F.2d at 896 (n. 25). *Thus, the majority, contrary to its own decision in this matter, appears to recognize that Austin and not Hudik was the object of the union's action.* Moreover, as pointed out by the dissenting opinion of Judge MacKinnon "[U]nder *National Woodwork* it is not sufficient that the agreement have a primary focus, if its enforcement is attempted by secondary pressures." 521 F.2d at 920.

POINT II

The Board's right-to-control test is consistent with National Woodwork.

Prior to *National Woodwork,* the District of Columbia Circuit as well as the Second, Third, Sixth, Seventh and Eighth Circuits had expressed their approval of the Board's examination of the right-to-control as a test of secondary objectives.[15] What then is said in *National Woodwork* that would require a different result? Initially, it must be recalled that this Court expressly declined to pass upon the test, noting that it was not in issue in *National Woodwork* because the contractor (Frouge) *did* have the ability to grant the union's demand that the doors in question be installed and machined at the job site.

Surprisingly, the majority below finds in this specific reservation of the control question a warning by this Court that the opinion is not to be read as impliedly approving the Board's right-to-control doctrine.[16] In reality, however, it is the disapproving circuits which have

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[15] *Local 5, Plumbers* v. *N.L.R.B.,* 321 F.2d 366 (D.C. Cir. 1963), cert. denied, 375 U.S. 921 (1963); *Local No. 636, United Assn. of Journeymen* v. *N.L.R.B.,* 278 F.2d 858 (D.C. Cir. 1960); *N.L.R.B.* v. *Entereprise Ass'n et al,* 285 F.2d 642 (2nd Cir. 1960); *Ohio Valley Carpenters District Council* v. *N.L.R.B.,* 339 F.2d 142 (6th Cir. 1964); *N.L.R.B.* v. *I.L.A., Local 1694,* 331 F.2d 712 (3rd Cir. 1964); *National Woodwork Manufacturers Ass'n* v. *N.L.R.B.,* 354 F.2d 594 (7th Cir. 1965), reversed on other grounds, 386 U.S. 612 (1967); *N.L.R.B.* v. *Local 157 Plumbers,* 369 F.2d 388 (7th Cir. 1966); *American Boiler Mfgrs. Ass'n* v. *N.L.R.B.,* 366 F.2d 815 (8th Cir. 1966).

[16] 521 F.2d at 893 n.14.

found in *National Woodwork* that which is not there, namely a rejection of the right-to-control doctrine. Proponents of the Board's approach simply state that the Board's application of the test is clearly compatible with principles established in *National Woodwork*. Indeed, if anything is to be inferred from the Court's express refusal to pass upon this issue in *National Woodwork,* it is that this Court perceived a critical factual distinction in situations where control was absent. Moreover, the conclusion certainly does not follow that by declining to consider the Board's "right-to-control" test this Court directly or by inference rejected that criteria.

In *Work Preservation and the Secondary Boycott—An Examination of the Decisional Law Since National Woodwork,*[17] the author commented on this misplaced reliance upon *National Woodwork*:

> "The doctrines of valid work preservation and right-of-control [sic] have always been felt to be mutually exclusive. Where the Board has found a valid work preservation objective, it has still considered the question of right-of-control; where it has found the unit employer to be without control, it has nevertheless found a violation (citation omitted). It is doubtful that *National Woodwork* changed this basic distinction. *National Woodwork* involved work preservation; the validity of the right-of-control doctrine was specifically not decided."

As the Board pointed out in *Koch,* with the subsequent approval of the Fourth Circuit, *National Woodwork* did not hold that where a work preservation object is estab-

[17] 21 Syracuse Law Review 907, 922 (1970).

lished a union's conduct in furtherance of that objective cannot violate Section 8(b)(4)(B). As the Board stated:

> "Rather, the whole thrust of the *National Woodwork* decision is that the pressure as directed to Frouge was primary only because (1) its object was work preservation and (2) Frouge was in a position, as the facts themselves demonstrated, to respond itself to the union's pressure and give the union's members the work that they had traditionally performed. Thus the union's pressure was not undertaken for its effect elsewhere. In a situation as here where the pressured employer cannot himself accede to the union's wishes the pressure is secondary because it is undertaken for its effect elsewhere. The fact that its object was work preservation standing alone is not sufficient to validate its action if, as we have found here, it is directed at a neutral." (Footnotes omitted)[18]

The Fourth Circuit in approving the Board's decision in *Koch* drew the following distinctions between the facts of that case (which are essentially the same as in the case now before the Court) and *National Woodwork*:

> "The incidents not paralleled in *National Woodwork* were these: no right-to-control was possessed by the employer; the unions were informed of the employer's lack of control; the employer-contractor agreement required the fabrication to be done at the latter contractor's location; and the contract between that contractor and the owner obligated that contractor to fabricate the pipe at its place of bus-

[18] 201 NLRB 59, 63 (1973) enforced sub nom *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323 (4th Cir. 1971).

iness. These circumstances are quite material in differencing the facts here from those of *National Woodwork.* The Court there did not have to ponder these added circumstances to the existence or absence of a secondary boycott. Thus it did not preordain decision here." 490 F.2d at 327

In *National Woodwork,* this Court said that the "touchstone" is whether the agreement or its maintenance is addressed to the labor relations of a contracting employer, vis-a-vis his own employees. We submit that the Board's approach to this problem is consistent with that criteria and its rejection is

When entering into a work preservation clause, an employer does not agree to cease doing business with a purchaser who mandates the utilization of prefabricated materials, rather he agrees that *he will not on his own initiative elect to use* prefabricated materials where not required by the specifications. To agree that he will not do business in circumstances where he does not have control and *cannot preserve* work for the unit simply obstructs his ability to carry on his business. Applying this Court's test then, a strike to enforce such an objective is not directed to the labor relations of the striking employees' own employer, but rather to those of either the general contractor, the architect, manufacturer or owner.

This point is even more clearly made when one considers that many specialty contractors in the construction industry have a relationship with only one union. Therefore, we might expect that such a contractor would agree with its union that all work conceivably within that craft's traditional work history should be done at the job site. Obviously, to the extent that he does so such a clause would guarantee *work not only for the union, but for the*

specialty contractor as well. Stated differently, both parties may try to "feather their nests" through the negotiation of a "work preservation clause". Thus, they leave the owner who desires to build with union labor to face the dilemma of doing it their way and absorbing unnecessary costs or resorting to non-union labor and accepting the problems that such a choice may engender. And, whether such a clause is obtained from a willing or unwilling contractor, it places an owner desiring to use union labor in a veritable stanglehold.

It is not the obligation of the Board in its consideration of secondary boycott cases to seek out the primary employer but rather *to protect the neutral. Local 1066 Longshoremen Association (Wiegand Terminals, Inc.)*[19] To do otherwise leads to the fallacy suggested by the Court below and of the Ninth Circuit in *Western Monolithics Concrete Products, Inc.* v. *N.L.R.B.,*[20] where that Court reached the anomalous decision that a contractor with the ability to grant the union's demands was secondary and a sub-contractor without that power was primary.

Why is it necessary in determining who is protected against a strike or picketing to select a party which the union may strike or picket? We submit it is not. Situations in which unions may not resort to the remedy of picketing or a strike are not uncommon, especially in the construction industry.

For example, under Section 8(f) of the Act, 29 U.S.C. 158(f), it is now lawful for a union and an employer to

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[19] 137 NLRB 45, 48 (1962).

[20] 446 F.2d 522 (9th Cir. 1971), reversing in part 180 NLRB 43 (1969).

enter into a collective bargaining agreement in the construction industry prior to the time the employer has any employees on its payroll. Recognizing, however, that if this right were unrestricted, job disputes, strikes, picketing and other forms of coercion might occur in its wake, Congress made clear that the use of force, coercion, strikes or picketing to compel such a prehire agreement would be unlawful.[21] In *Centlivre Village Apartments,* 148 NLRB 854 (1964) the Board, reversing its previous holding in *Colson & Stevens,* sanctioned picketing to obtain a so-called "hot cargo" agreement under Section 8(e) of the Act. Nevertheless, the Board further held that under Section 8(b)(4)(B), lawful hot cargo clauses may be *enforced only through law suits and not through economic action.*[22] Thus there are labor objectives permitted by the Act which cannot be obtained or enforced by strikes or picketing. This point was clearly articulated by Judge MacKinnon in his dissent below. He said:

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[21] *Construction Laborers Local 383* v. *N.L.R.B. (Colson & Stevens),* 323 F.2d 422, 425 (9th Cir. 1963) reversing 137 NLRB 1650 (1962); H.R. Rep. No. 1147 on S 1555 (Sept. 3, 1959).

[22] We submit that the reversal by the Board of its *Colson & Stevens* doctrine was in error and established a point of law which this Court has never approved and which has spawned much of the confusion that confronts us today in the law of secondary boycotts. In *Connell Construction Co., Inc.* v. *Plumbers Local 100,* 421 U.S. 616 (1975) n.14; 95 S.Ct. 1830, 1840 n.14 (1975), this Court noted the argument advanced that §8(b)(4)(B) forbids picketing to secure a "hot cargo" agreement in the construction industry. The Court said, however, that because the agreement in *Connell* was outside the §8(e) proviso, it was unnecessary to consider this contention. Hopefully, the Court will have occasion to address this issue as it cries out for definitive judicial determination.

"The majority skirts the effect of the inclusive language of section 8(b)(4)(B) by insisting that the provision cannot in all reason be construed to preclude enforcement of a valid collective bargaining agreement. But we have been cautioned not to expand the Union's right to strike beyond the limits prescribed by the Act. The principle that 'a violation of the secondary boycott provisions cannot be justified by a contractual arrangement between the union and the neutral employer' dates to the Supreme Court's 1958 *Sand Door* decision. *There the Court recognized that a union might be left with a valid contractual provision and with no means of enforcing it other than in a civil suit.* The majority position is largely premised on the legitimacy of the Union's work preservation goal, but this court has given unequivocal support to the almost tautological view that legitimate ends may not be pursued by unlawful means. Where the valid goal of compelling compliance with a contractual provision combines with the unlawful object of pressuring neutral or secondary employers to achieve that goal, the statute will not permit a union to engage in economic action." (footnotes omitted) 521 F.2d at 935-936. (Emphasis added)

Judge MacKinnon also pointed out that the legislative history of the Act fully supports the Board's right-to-control test. He noted:

> "In passing the original secondary boycott restriction, the House of Representatives forecast the use of a right-to-control test when it indicated that it intended to proscribe those boycotts where 'the employers are powerless to comply with the de-

> mands giving rise to the [boycotting] activities. . . .' H.R. Rep. No. 245, 80th Cong., 1st Sess. 23 (1947), I 1947 Leg. Hist. 314." 521 F.2d at 926

Fidelity to the principles of *Denver Building Trades* requires that regardless of the union's ultimate objective, proscribed conduct nevertheless violates the secondary boycott provisions of the Act if *an* object of the union is to cause one employer to cease doing business with another or of seriously disrupting their relationship.[23] As this Court said in *N.L.R.B.* v. *Local 825 Operating Engineers,* 400 U.S. 297, 305 (1971), the "cease doing business" objective is present where the implication is present that although a union may prefer to obtain the disputed work, if not obtained, it will require a cessation or impairment of the business relationship.

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[23] Indeed, Hudik-Ross would have even less control over the selection of air conditioning units by Austin than the general contractor could have conceivably exercised over his subcontractors in *Denver Building Trades.*

POINT III

National Woodwork did not render all product boycotts free from the proscriptions of Section 8(b)(4)(B).

In his dissenting opinion in *National Woodwork,* Justice Stewart very pointedly observed:

> "[I]t is misleading to state that the union in *Allen Bradley* used the product boycott as a 'sword'. The record in that case establishes that the boycott was undertaken for the defensive purpose of restoring job opportunities lost in the depression. Moreover, the Court is unable to cite anything in *Allen Bradley,* or in the Taft-Hartley Act and its legislative history, to support a distinction in the applicability of Section 8(b)(4) based on the origin of the job opportunities sought to be preserved by a product boycott. *The Court creates its sword and shield distinction out of thin air; nothing could more clearly indicate that the Court is simply substituting its own concepts of desirable labor policy for the scheme enacted by Congress.* (Emphasis added)." 386 U.S. at 657, 658

The majority opinion in *National Woodwork* does not say that all product boycotts are lawful but attempts to develop the "sword v. shield" distinction. The majority opinion clearly is critical of any union effort that seeks to reach out and monopolize job tasks for its members. It observes:

> "We therefore have no occasion today to decide the questions which might arise where the workers carry on a boycott to reach out to monopolize jobs

or acquire new job tasks where their own jobs are not threatened by the boycotted product." [24]

Certainly a product boycott in circumstances where a struck employer is unable to satisfy the union's thirst for unattainable work *is* an effort "to reach out to monopolize jobs". It is also an effort to undermine a collective bargaining unit elsewhere or to acquire the work of other employees. *Those employees and their employers possess rights which also deserve protection.* Broadly speaking, the monopolizing effort is a jurisdictional dispute of grand design and clearly a restraint on commerce.

Thus, this effort which is euphemistically referred to by respondent as a "work preservation dispute" *is really a make work or monopolize work claim.* What is sought is the use of unbridled pressure on anyone upon whom such pressure can be brought, regardless of his neutrality in the dispute or his inability to effect a change, in order to take work away from other employees and their employers elsewhere.

In *Connell Construction Co.* v. *Plumbers. Local 100,* 421 U.S. 616 (1975), this Court pointed out that one of the major aims of the 1959 amendments to the Act was to limit "top down" organizing campaigns in which unions used economic weapons to force recognition from an employer regardless of the wishes of its employees. 421 U.S. at 632. Similarly, rejection of the Board's "right-to-control" approach would permit unlawful pressure from the *bottom up* by placing pressure upon a party unable to satisfy the union demands, and a neutral to the dispute. As pointed out by the dissenting opinion in the instant case:

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[24] 386 U.S. 612, 630 (1967).

"[T]he Union's dispute cannot logically be solely with the subcontractor but must instead be also with the party who dictates that prefabricated products shall be employed: the owner, the designer, the general contractor." *Enterprise Association Local 638* v. *N.L.R.B.,* 521 F.2d 885, 932, 933 (D.C. Cir. 1975)

Such conduct traditionally has been construed as unlawful secondary activity regardless of whether the union may also have had a legitimate work preservation objective. *N.L.R.B.* v. *Denver Building Trades Council,* 341 U.S. 675 (1951); *N.L.R.B.* v. *Local 825 Operating Engineers,* 400 U.S. 297, 305 (1971).

Product boycotts therefore are not sanctioned by *National Woodwork* when employed to obtain new work, to monopolize jobs, or where, as in the instant case, they are enforced by secondary conduct against an employer who is powerless to accommodate the union in the achievement of its ends. Just as Connell, a general contractor, could not legally control the labor relations of its subcontractors, so too in the instant case Hudik could not control the selection of materials by the project general contractor. Hudik's agreement with the union, therefore, must be viewed as one where it agreed that *it would not on its own initiative elect to use* prefabricated materials *where not required to do so* by the job specifications.

To give broader reach to the union's work preservation provision as does the majority opinion below, would not only permit an unlawful intrusion upon the right of Hudik to carry on its business with others, but would also permit the union by secondary activity to intrude upon the relationships of the general contractor with the purchaser of construction and the purchaser with the manufacturer.

It is well recognized that a union's conduct may have various objectives. *N.L.R.B.* v. *Denver Building Trades Council,* 341 U.S. 675 (1951). If then, the Court finds that *an* object of the union's conduct was to force or require a cessation of business with Austin, the Board's finding of a violation must be sustained. Stated differently, it is that purpose, namely, to bring about a total or less than a total cessation of business, to destroy, disrupt or interrupt a business relationship whether as an immediate,[25] ultimate,[26] conditional[27] or alternative object,[28] express or inferred, that Congress condemned through the enactment of the Taft-Hartley Act. In light of this condemnation, and the fact that the enactment of Section 8(e) was not intended to vitiate the body of law built around *Denver Building Trades,* it is clear that the Board has properly exercised its judgment in this and similar cases. *N.L.R.B.* v. *Local 825 International Union of Operating Engineers, AFL-CIO,* 400 U.S. 297 (1971).

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[25] *Tennessee Coal and Iron Division of United States Steel,* 127 NLRB 823 (1960), enforced as modified, 294 F.2d 256 (D.C. Cir. 1961).

[26] *N.L.R.B.* v. *Denver Building Trades Council,* 341 U.S. 675 (1951).

[27] *Texas Industries,* 112 NLRB 923, n. 2 (1955), enforced, 234 F.2d 296 (5th Cir. 1956).

[28] *Bangor Building Trades Council, AFL-CIO (Davidson Construction Co., Inc.),* 123 NLRB 484 (1959), enforced, 278 F.2d 287 (1st Cir. 1960).

POINT IV

Restriction of the Board's approach will have adverse economic consequences upon the construction industry.

There is further support for the Board's view if we look through the other end of the telescope. What are the ramifications for the purchaser of construction? We know of no rule of law which permits a union to restrict a purchaser from specifying the type of material that will be utilized in his product. For example, a union cannot bring economic pressure upon an employer to force him not to comply with engineering specifications for government contracts in the defense industry, i.e. navel vessels, planes, tanks. Why then should construction be different? Essentially, when a contractor agrees to a work preservation clause he is agreeing that *insofar as it is within his control* he will not use certain prefabricated materials. It is a strained contractual interpretation that would compel a contractor as his sole alternative to reject work if the owner is adamant in his insistence upon his specifications.

An analogous situation was present in *N.L.R.B.* v. *Local 825 Operating Engineers.*[29] There the general contractor, Burns & Roe, had subcontracted all of the construction work at a nuclear generating station project in New Jersey to three other companies. In the course of construction, one contractor, White, utilized an electric welding machine and assigned its operation to members of the Ironworkers Union. Local 825 objected to the assignment and when Burns & Roe refused to accede to the

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[29] 400 U.S. 297 (1971).

demand that it sign a contract with Local 825 which would be binding on all subcontractors, all operating engineers employed by the three subcontractors walked off the job. The Third Circuit held that the union was not seeking by its strike activity to cause a cessation of business between White and Burns & Roe but merely a disruption of operations sufficient to bring pressure upon White through Burns & Roe to accede to the union's demands. It said, therefore, that to violate Section 8(b)(4)(B) the union must seek a *total* cessation of business between the primary and the secondary parties.

This Court, however, refused to take such a "narrow view" of Section 8(b)(4)(B). It recalled the principles of *Denver Building Trades,* wherein it was held that a violation exists if proscribed conduct is *among* the union's objects, even though it is not its *sole* object. In ***Burns & Roe*** this Court said:

> "Certainly, the Union would have preferred to have the employers capitulate to its demands; it wanted to take the job of operating the welding machines away from the ironworkers. It was willing, however, to try to obtain this capitulation by forcing neutrals to compel White to meet Union demands. To hold that this flagrant secondary conduct with these most serious disruptive effects was not prohibited by Section 8(b)(4)(B) would be largely to ignore the original Congressional concern." 400 U.S. at 305

So it is in the situation now before the Court. Surely the union would prefer that Hudik be offered and accept the work under its conditions. The ultimate object must be that unless those conditions are met (by Austin succumbing to the pressure upon Hudik), Hudik will cease doing business with Austin.

The ramifications of the union's conduct are no better demonstrated than in their application to Public Service Electric and Gas Company and the member companies of the Edison Electric Institute. As public utilities engaged in construction programs costing billions of dollars, they rely upon union labor. American Cyanamid, like other major purchasers of construction does likewise. History has shown, however, that union labor is often not its own best friend. We submit that it plants the seed of its own destruction in a philosophy that seeks to hold back the tide of technological change and says, "You'll do it our way or not at all."

It has been said that due to current population expansion we must, between now and the year 2,000, build as much as we have built since the discovery of America. This being so, it is absolutely essential that we create and apply new techniques which together with skilled manpower will accomplish this enormous task economically and efficiently.

Does the organized branch of the construction industry have the needed manpower and skills to accomplish the tasks required by modern design and methods in all phases of construction? Do the building trades have sufficient skilled men available? Until the recent recession, in the Northeastern United States, for example, some critical skills required at the work site could not be provided in sufficient quantity and quality to meet construction schedule requirements. High pressure and high temperature pipefitter crafts have not provided sufficient numbers of journeymen with welding qualifications to meet code certification requirements for many types of alloys and spe-

cialized sizes. Requisitions for persons with these special qualifications lay unfilled in union hiring halls. Prefabricated equipment built on factory jigs and fixtures using automatic or semi-automatic equipment could help to overcome these critical skill shortages unless their use is precluded by judicial decisions such as that below which stifles progress and permits building trade unions to reach out for what is not rightfully theirs.

With the energy crises facing our nation, power companies and other companies involved in meeting the needs of the public should not be engulfed in squabbles between contractors and unions over how a particular job must be done, when, in fact, the overriding concern should be that the job must be done. Moreover, the disputes of these competing parties should not be allowed to effectively interfere with the long-range planning and execution of responsibilities of these publicly regulated companies that have a far different standard and concern for the public welfare. Indeed, this concerned interest mirrors the sound restrictions of our law prohibiting interference with the free flow of commerce and unlawful restraints of trade.

Again, drawing upon the dissent below, we see the parallel between the facts of this case and *Allen Bradley Co.* v. *Local 3, I.B.E.W.*, 325 U.S. 797 (1945). Justice MacKinnon states:

> "Prior to passage of section 8(b)(4)(A) the boycott imposed by Local No. 3 was successful in requiring that electrical fixtures or installations manufactured elsewhere be 'dismantled and the wire taken out of them, and then' rewired on the job by the local union before they could be installed in New York City.
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> . . .
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> The result in the case of Local No. 3 would be the delivery to the installers of incomplete fixtures without internal wiring (or dismantling and rewiring) and with Local No. 638 (the Steamfitters) it would be the delivery of incomplete air conditioning units without internal piping (or dismantling and repiping)." (footnotes omitted). 521 F.2d at 924, 925

Although not yet actually in use, one technique for compressing the time required to build generating facilities is to purchase completely prefabricated generating stations, barge mounted, and to float them into position substantially ready for service. Public Service Electric and Gas has on order floating nuclear generating stations which will be manufactured by Offshore Power Systems, a joint venture of Tenneco and Westinghouse. Of even greater significance in the more distant future is the program of standardization of nuclear units proposed to nuclear steam supply system manufacturers by the Nuclear Regulatory Commission. Both approaches will enable public utilities to obtain increases in generating capacity within a more reasonable time span of five or six years. Both approaches will require extensive prefabrication. Should public utilities be frustrated or effectively prevented from exercising freedom of choice—their right-to-control if you will—because of restrictive work preservation clauses in union contracts? Is this in the public interest and can the secondary boycott strictures of the Act be so perverted as to enhance this possibility? We think not. Patently, the factors to be considered in this setting far transcend the usual bickering between an employer and its union.

We submit, therefore, that considering all of these circumstances, it makes little sense to allow unions and/or employers to engage in economic warfare in this context

at the expense of the community. No matter how a union may try to euphemistically phrase its position, what in fact is afoot here is an effort by construction unions to put pressure on whomever they can in order to force a method of construction that is not desired by the purchaser. This does not promote the interest of the consumer and we submit does not promote that balance and harmony in industrial relations which the Act seeks to achieve through the laudable pursuits of free collective bargaining.

CONCLUSION

For all of the foregoing reasons, the Court is urged to reverse the decision of the court below as prayed for in the petition of the National Labor Relations Board.

Respectfully submitted,

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